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ST. LOUIS, MO., JULY 21, 1911.

ARE THE ADVANTAGES OF TO-DAY ARGUMENTS FOR, OR AGAINST INITIATIVE AND REFERENDUM?

Mr. Frank W. Clancy, Attorney General of New Mexico, in addresses made when the question was being discussed of New Mexico's constitution containing or not provisions for initiative and referendum and possibly recall, took strong ground against such provisions.

General Clancey in one of those addresses, to which our attention has been called, treated these matters in a manner, that argued that forcefulness in presentation could well afford to rely upon dispassionateness in discussion. He notes, however, that the advocates of the above processes in legislation and administration employ "vituperation, personal abuse and eloquent denunciation as argument" on their side.

It would seem that of all the times that dispassionate discussion should be preferred, one would be by those who are contending that the structure of our government needs to be changed in the radical way that initiative, referendum and recall or either proposes.

The *crux* of the situation rests in the question whether or not deliberation so necessary to just government would obtain under these processes. If at the very outset the people do not appear so very serious in regard to the weighty responsibilities proposed to be added to citizenship as to make inflammatory appeals seem wholly out of place, the contention that these responsibilities should be added appears greatly discredited before the bar of reason.

General Clancey's view of a constitution is, that: "It should not descend to a regulation of the details of governmental business nor attempt by provisions akin to legislation to provide for immediate, possibly temporary exigencies, but should do no more than indicate, on broad general lines, the power of the different depart-

ments of the governments and the necessary limitations on the exercise of those powers."

This view does not, however, either necessarily or inferentially, exclude incorporation in constitutions of the theory of initiative, referendum or recall, for the chief trouble with them is, as we regard them, that the principle in them is a very broad and a very vicious one.

He, however, takes decisive ground against them in urging the preservation in all their integrity of "the three great divisions of government—the legislative, the executive and the judicial," and the keeping of "the line of demarcation between these departments as clear and distinct as practicable."

Furthermore he attacks with vigor the practical working of initiative and referendum, both by reference to what has taken place and by appeal to the common sense of people urged to accept such a scheme of government.

He says: "Our difficulties do not come from the incapacity or inability of the people to vote wisely in the election of legislators, but are due to the fact of the practical indifference of the masses to matters of general public concern * * * and that indifference cannot be dissipated by the changing of the purpose of an election from the choosing of men to the adoption of laws."

Assuming the continuance of such indifference, he goes on to say: "If corporate greed or the unscrupulous selfishness of any class of people should earnestly desire the adoption or rejection of any law, without regard to the public welfare, those who might be animated by such improper motives would take an aggressive and vigorous interest in the election, while a great proportion, perhaps a majority, of the people would remain indifferent or unconcerned. That this is possible is clearly shown by a story which comes from Los Angeles and which I am assured is entirely true. A scandalous condition existed in that city as to ill-regulated and vice-creating dance-halls. An ordinance was adopted by the city for the purpose of regulating and restricting the

evil. The vicious and demoralized classes, interested in the dance-halls, with great ease secured the necessary number of signatures of voters for a referendum as to this ordinance, and, having an active interest in the matter, voted in full force against the ordinance, while the average citizen paid no attention to the election. As a result, the ordinance was set aside."

In this age selfishness is more the business of life than contemplation of the welfare of society. All of us can feel and keenly where the rigor of the law touches us, and few appreciate its beneficence, operating in a general way and depending on a sort of moral influence for its justification. Indeed, we think no more of the presence of that beneficence than of the salubrity of the atmosphere in which we dwell and take no account of any miasma that may have crept into it. We do not anxiously notice encroachments that selfishness seeks and doubt about their very existence when told.

Here we perceive that in a congested center of population, where a daily press ought to have had influence enough to arouse, as it certainly had the means to inform, the vicious prevail because the good citizen does not respond.

A success of the kind instanced has a two-fold result: it encourages the bad citizen, it depresses the good. With the former there is ever the spur in a degraded nature—with the latter, repeated appeals to bestir himself for the public weal, in the face of moral Waterloos, fatigue his civic spirit.

In this situation selfishness triumphant rides on to greater abuses, until revolution finally takes no account of how it has entrenched itself in the citadel of law.

Who would say, that exactly what occurred in Los Angeles might not be expected in any large city of the country, if money and greed, depending on indifference, essayed to bring it about?

The Los Angeles incident, however, is especially significant, because it was in reference to something, that should be sup-

posed to come home to the citizens of a city, it having both a local and a moral aspect.

How greatly more would indifference be presumed to exist as to questions more complex and questions less intimately affecting our every-day life? But they might not be more remote from selfish interest and the stake in their success might be great enough to attract active partisans in their behalf.

With these processes the machinery of government and the character of its legislation would be in the eye of selfish combination, more than ever before, just because selfishness never tires of working for itself, and combination, which is abhorrent to enlightened patriotism, is the main instrument for the success of a selfish purpose. It can generally count its supporters, and knows how to recruit from the opposition or lessen its force. It is always scheming and planning, while patriotism blindly trusts to fortune.

NOTES OF IMPORTANT DECISIONS.

COURTS—DISQUALIFICATION OF JUDGE BY REASON OF HAVING BEEN OF COUNSEL.—In *Hamilton County v. Aurora Nat. Bank*, 131 N. W. 221, decided, on rehearing, by Supreme Court of Nebraska, we ascertain that a motion to vacate a judgment of reversal, shown in same case in 129 N. W. 267, was overruled.

It appears from the opinion denying this motion, that the supreme court consists of seven members and no reversal of a judgment by a lower court can be entered except by the concurrence of four, whether the case in the supreme court be heard by a less number than seven or not.

Two of the members did not sit and only three of the remaining five were in favor of reversal. Under these circumstances the five sitting judges requested one of the two not sitting to participate in the decision "and he reluctantly consented."

The opinion as reported in 129 N. W. at page 267, et seq represents one judge by name as not sitting," and the plain inference from the decision is that of six sitting two dissented from the judgment of reversal.

It is admitted in the opinion overruling the motion to vacate the reversal that two of the seven did not sit in the hearing of the oral arguments. But, among the five who did sit, the necessary four for reversal were not present. The court says: "In this dilemma the five sitting members insisted that Judge Sedgwick should take part in the decision and he reluctantly consented."

We are well prepared to admit there was an exigency in this case, and that appellant would have the right to demand, that, if a mere sense of delicacy or propriety on the part of the judge, who declined to sit, was standing in the way of an effort to obtain a reversal, otherwise unattainable, his right to make that effort ought not to be denied.

But we cannot see, that the court and the non-sitting judge have proceeded properly in rendering a decision without that judge, who was indisposed to take part in the decision, first hearing oral argument, and also first hearing oral argument against his sitting at all. The last clause is emphasized by the fact that only the five who first sat pass upon the motion to vacate.

The court in soliciting one judge to help them decide a case on the briefs, alone, when presumptively he needed oral argument more than did the others, is not apparently right, even if it may be lawful. It belongs to an appeal, that counsel are entitled to be heard in oral argument as well as by printed brief.

But we even doubt, as the court seemed itself to doubt, whether the sixth judge had a right to participate in the decision that was rendered.

The spirit of the Nebraska statute which forbids anyone from being a judge who "has been attorney for either party in the action," does not refer to interest, because that is a bar independently of this clause, but it looks to the securing of a judge with an open mind upon any question to be presented.

It appears that, in a similar case against the same defendant, the reluctant judge represented it. The same issues were involved. The judge only argued for it a plea in abatement which was disposed of adversely. But it is presumed he looked into the merits of the defense and something of partisanship must have been imbibed by him. It is also to be presumed he discussed with his associates (and it appears he was only one of other counsel) the case fully, and he, therefore, must be thought to have participated in the decision with a predisposition to decide in the way he did.

Literally he does not come under the statute, but he stands so close to the border line of exclusion, that counsel should have been heard

fully as to his right to sit, and then been allowed the fullest opportunity, after it was held that he should sit, to help him discard any impression gained from investigation as counsel in the other case. The record in this matter seems not altogether unexceptionable.

PROPERTY RIGHTS IN HUMAN BODIES.

The body of a human being after death occupies a somewhat unique position in law. In a sense, it is property, yet in a general sense it is not. In the nature of things, it is and will no doubt always be, against public policy to traffic in the bodies of human beings. Generally speaking, they are not the subject of barter and sale. They are not taxable, for there is no way to enforce a tax against a body without making it property. The body is formed of mineral and vegetable matter, we are told, which is continually renewed and wasted by the process of building up and tearing down incident to the natural growth and preservation of flesh and bone. Alive, the body, of course, has many civil and other rights. Dead, it returns to the elements which compose it and in the due order of nature mingles with and becomes part and parcel of them. Not being property, it could not be mortgaged, incumbered or sold. Nevertheless, while the intangible spark called life gives action and thought, the person himself has some interest and dominion over the disposition of his remains. This right is sometimes exercised when one gives his body over to scientific investigation after death. But the body does not descend by inheritance. The heir inherits the property of his ancestor, dying intestate, yet he will not come into the possession or ownership of his dead body through the law of descent." Though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring a civil action against such as indelicately, at least, if not imperiously, violate and disturb their remains when dead and

buried."¹ The law recognizes a *quasi* property status of human bodies, and in keeping with this idea will protect those who by blood or other relationship may have a superior right to possession and control. It has been held, therefore, that a court of equity has such a superintending control over a dead body and may protect and enforce the right of relatives and friends to testify their respect and affection for their late friend and relative in the customary manner.² In the case of a person dying at the house of a stranger, a rather novel as well as unpleasant duty is imposed upon the host by the common law. In such a case, he cannot cast the body out into the street where it would become a nuisance and the prey of dogs or other carrion-eating animals. Nor can he keep it in his house permanently and thus subject it to decay and disintegration in the open. He must do more than this. He must see that it has a decent burial, and he cannot even take it to the place of burial uncovered, but must see that it is decently robed to the end that the sensibilities may not be offended.³ But one whose guest had thus died in his house would be put to some embarrassment if he had no place to effect the burial and others would not sell land for the purpose. In this country, however, provision is usually made by the local laws for the disposition of bodies of paupers and unknown persons dying away from relatives and acquaintances.

No one can compel another to sell a parcel of land for burial purposes. The owner does not have to accommodate those in need of a burial place any more than those who may need land in large or small tracts for other legitimate purposes. This is even true of a religious or other corporation or a private person owning land for burial purposes. The owner may sell any amount he pleases for this purpose, but he cannot be

compelled to sell even the smallest plat.⁴ But in such cases when the corporation or owner of cemetery land sells a plat or parcel thereof, the purchaser at once becomes entitled to the use of the land for the burial of any one he chooses; and the owner, whether a charitable or religious corporation, cannot prevent the interment in a lot thus bought of a person holding a religious belief odious or obnoxious to the former owner of the land for any reason. In other words,⁵ unless restricted in the grant, a conveyance of a cemetery lot will vest in the grantee an absolute title to the land and not a mere privilege of burial of a temporary nature.⁶ Of course, if the use of the land is restricted in the grant to the burial of persons of a certain race, creed, etc., only, it could not be used for the burial of any other class of persons.⁷ But probably the most fruitful source of litigation arises over the contention of the next of kin and the surviving wife or husband. As against strangers in blood, the courts all hold that the right to the possession and control of a dead body for burial purposes is with the next of kin.⁸ This seems to be the generally accepted doctrine in this country. The reasons given by the Kentucky court are: "There is a tender and more affectionate relationship between husband and wife than between either and other relatives. In life there is a constant companionship, a continued mutual and dependent relationship, and such ministration in sickness and in death that can be given by no other."⁹ And the Minnesota court has well said that "the general, if not universal, doctrine is that this right belongs to the surviving husband or wife or the next of kin; and, while there are few direct authorities upon the subject, yet we think the general tendency of the courts is to hold that, in the absence of any

(4) *People v. Coppers*, 58 How. Pr. 55.

(5) *People v. Coppers*, 58 How. Pr. 55.

(6) *In re Presbyterian Church*, 3 Edw. Ch. 155, 169; *People v. Coppers*, 58 How. Pr. 55, 60.

(7) *People v. Coppers*, 58 How. Pr. 55, 61.

(8) *Larson v. Chase*, 47 Minn. 307; *Hackett v. Hackett*, 18 R. I. 155; *O'Donnell v. Slack*, 123 Cal. 285; *Neighbors v. Neighbors*, (Ky.) 65 S. W. 607; *Winkoop v. Winkoop*, 42 Pa. St. 293.

(9) *Neighbors v. Neighbors*, (Ky.) 65 S. W. 607.

(1) 2 Bl. Comm. 429; *In re Presbyterian Church*, 3 Edw. Ch. 155, 168.

(2) *Pierce v. Swan Point Cem.*, 10 R. I. 227, 243.

(3) *Regina v. Stewart*, 12 Ad. & E. 773. See, also, *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 301; *Pierce v. Swan Point Cem.*, 10 R. I. 227, 237.

testamentary disposition, the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin. This is in accordance not only with common custom and general sentiment, but also, as we think, with reason. The wife is certainly nearer in point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest ties of love, and should have the paramount right to render the last sacred services to his remains after death."¹⁰ But this right of the wife, like any other right, may be lost by her fault. It exists only when she is living with her husband at the time of his death in good faith and properly performing on her part the duties of a wife.¹¹ Manifestly, therefore, a wife who has turned her back on her husband and left him without fault on his part, or who has been divorced because of her own fault, can have no claims to the dead body of her husband as against the next of kin. The very relationship between the two which makes them man and wife—one flesh in law—must continue to the time of death. Where that is repudiated by either, whether in the form of abandonment and estrangement or of divorce, then the right is completely lost. Especially would this be true where the survivor claiming the right has been divorced for his or her fault. There might be exceptional instances where proceedings for a divorce might be brought improperly by one party when and while the other was faithfully performing and discharging the duties of the marital relation and against the wishes of such a defendant. If death should intervene pending such proceedings, it would seem upon principles of equity and justice that the survivor would still have his or her rights in the dead body. But in such a case where the innocent party should die pending the divorce proceedings wrongfully and improperly begun by the survivor, it would seem, upon like principles, that the right would be forfeited, and the right of the next of kin would become

paramount. The right may also be lost by estoppel or a failure to assert it properly in good faith. Thus, where a body, with the consent of the wife, was interred in a lot owned at the time of death by the husband and which came to his child by operation of law or otherwise; where the body thus buried had remained without objection by the widow for thirteen years, it was held that she would have no right to disinter and remove the body to any other place against the objection of the next of kin.¹² But where there are no obstacles of this nature, the person entitled to the disposition of the body, whether the surviving wife or husband or the next of kin, may not only select the place of burial, but may also change it at pleasure.¹³ But it would seem that in a contest between the surviving husband or wife and the children of the union, that the right of the survivor will be given precedence over the claim of the children because the law presumes the ties between husband and wife to be closer than between any others.¹⁴ Of course, the right of the husband and wife, respectively, as survivor, is the same. The husband has precisely the same right to his wife's remains as she has to his. But the law goes somewhat further in imposing duties upon the husband, for it is his duty "to dispose of the body of his deceased wife by a decent sepulture in a suitable place."¹⁵ And Lord Loughborough held that it was the duty of the husband to provide a suitable interment appropriate to the station in life of the deceased, and that where the wife died in the absence of her husband and the father, at his own expense, had her suitably buried, the husband would be liable to him for the money thus laid out, though he did not expressly approve or authorize the expenditure.¹⁶ In such cases, there is necessarily an implied undertaking on the part of the husband to reimburse those who furnish the burial facilities which the law requires him

(10) *Larson v. Chase*, 47 Minn. 307.

(11) *Larson v. Chase*, 47 Minn. 307.

(12) *Pierce v. Proprietors*, 10 R. I. 227.

(13) *Neighbors v. Neighbors*, (Ky.) 65 S. W. 607.

(14) *Neighbors v. Neighbors* (Ky.) 65 S. W. 607.

(15) *Durell v. Hayward*, 9 Gray (Mass.) 248.

(16) *Jenkins v. Tucker*, 1 H. Bl. 90, 93.

to provide. Of course, where the husband is present or so situated that he can himself direct the burial, no one would have the right to meddle and look after it for him—unless he should fail or refuse to do so. But it would seem that there is no corresponding duty upon the wife to see that her husband has proper burial at her expense. She was not liable for his debts or support at common law, and while she has been relieved of many common law disabilities in this country by statute, she has never been made liable for his debts—not even his funeral expenses. Ordinarily, the husband's estate is liable for his necessary burial expenses. And under statutes enabling a *feme covert* to own property, contract, sue and be sued with reference to her own estate, it would be liable, no doubt, for her funeral expenses in keeping with her station in life if her husband were dead or they could not be realized out of his estate.

The right of the surviving wife or husband and, in the absence of such, the next of kin, is jealously guarded by the law. It is paramount to any claim of the executor or administrator of the estate. The body does not become property by death, forming as asset with his other property for administration in the courts of probate.¹⁷ Such courts have no right at all to make any order affecting the body or its disposition.¹⁸ It is paramount, also, to the authority of a city or municipal government.¹⁹ But there might be cases where the private right of the individual would have to give way to public necessity as in other property rights. For instance it would, ordinarily, be within the power of a city government to make reasonable rules and regulations concerning the disposition of dead bodies necessary to protect the public health and by virtue of this authority it could provide the manner of burial necessary to carry out its policy of protection from dangers of infection. And a refusal of those having by virtue of relationship

the general right to dictate the manner and place of disposal of the body to conform to such reasonable regulations of the municipal authority would subject them to all lawful penalties enacted by the local government to enforce its regulations. The reason of this principle is, the wish or right of the individual must yield to the more important concern of the public at large. And, as a city would in such cases have the right to refuse the privilege of burial within its limits except under the necessary restrictions, it logically follows that no action could be maintained by those in interest against the city for such act. But there are, cases, however, where the law will afford redress in the way of damages for an act arising out of the use or care of dead bodies. For instance, while a dead body is not property in the strict commercial sense and is not supposed to have any money value, yet damages have been allowed even such as flow from mental anguish for the mutilation of a corpse by those having no right thereto. These are allowed on the theory that it is the only means the law has of affording relief and it will not permit a wrong which is naturally and necessarily such a shock and outrage to the senses of those near and dear to the dead, to go unredressed.²⁰ And where the parents of a child contracted with an undertaking establishment to keep the body of their child until such time as they could get ready for the interment and the undertakers negligently sent the body out of the state by mistake where it was buried, it was held that they were liable to the parents in damages such as would compensate them for the shock to their sensibilities arising from such act of negligence.²¹ After a body has been interred in a permanent resting-place, it becomes part and parcel of the soil. It then and thereafter belongs to the soil of which it is a part.²² Where the body is thus interred, an action of trespass will lie at the instance of the owner of the burial lot against a stranger

(17) *Renihan v. Wright*, 125 Ind. 536.

(18) *O'Donnell v. Slack*, 123 Cal. 285.

(19) *Hackett v. Hackett*, 18 R. I. 155.

(20) *Larson v. Chase*, 47 Minn. 307.

(21) *Renihan v. Wright*, 125 Ind. 536.

(22) *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135; *Pulsifer v. Douglass*, 94 Me. 556.

who attempts to remove or in anyway disturb the body.²³ The husband or wife and the next of kin, as against strangers, at least, have a right of action against any one thus interfering with the dead and may recover damages for the necessary injury to their feelings against any who may thus unlawfully invade the resting place of the dead and violate the common rights of humanity by removing the dead body.²⁴ But the right to permanently preserve a body in a cemetery does not always exist. If the person entitled to direct and control the disposition of the body own the fee to the parcel of land in which it is interred, no complications could arise; for, while the body would be considered in law as part of the soil after permanent interment, yet no one could complain that the owner has moved part of his soil to another place. Indeed, the courts would not lend an ear to a complaint of one who had no voice in the preservation or disposition of a dead body. He would be merely a meddler with no rights in court whatever. But a different case is presented where the burial takes place merely by consent of a cemetery association, whether maintained by a municipality, a corporation or individuals. Where, in such cases, a mere permission is given to use a plot or lot of ground for the resting place of the body, the fee to the soil does not pass to those having the interment made. The effect of these privileges is usually construed to be a mere easement or license to occupy the ground for this purpose. This easement no doubt carries with it the implied right for the next of kin and others who are interested at all reasonable times and on any suitable occasion to visit the last resting place for the purpose of paying their tribute of love and respect for the dead. And, while the title to the burial lot could be acquired as against the cemetery association by adverse use for the necessary period of time, yet in the absence of such a state of facts, the title of

the association would remain unimpaired.²⁵ Under such circumstances the right of burial continues so long as the property owned by the cemetery authorities is used as a burial ground. So long as it is thus used, the parties in interest would have a right as against any stranger or meddler to prevent a disturbance of the remains of the dead relative.²⁶ But if in the ordinary course of events it should become necessary to use the cemetery for other purposes, it is lawful for the owners to do so.²⁷ But even under such circumstances it is necessary and the duty of the cemetery association to give to those in interest notice of the contemplated change and an opportunity to make arrangements and select a place for the reinterment.²⁸ But where the parties in interest are unknown and cannot, therefore, be notified, the removal can nevertheless be made to some other convenient and suitable place.²⁹ An invasion of a right of this nature, owing to its peculiarity and the difficulty of rendering adequate and exact damages in an action at law, it would seem, could be prevented by injunction or other proper order from a court of equity.³⁰ In harmony with this idea it was held in a case where the widow had consented to the interment of her husband in a lot owned by the father, who bore all the expenses of the burial, she would be enjoined from removing the body to another burial place several years after.³¹ In cases of this kind there is an element of estoppel. The widow would not be acting in good faith to have her husband buried suitably at the expense of his father under an agreement or consent

(23) *Pulsifer v. Douglass*, 94 Me. 556, *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135.

(24) *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135.

(25) *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135.

(26) *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135.

(27) *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135.

(28) *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135.

(29) *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135.

(30) See *Pulsifer v. Douglass*, 94 Me. 556; *Burney v. Children's Hospital*, 169 Mass. 57; *Gardner v. Swan Point Cemetery*, 20 R. I. 646.

(31) *Peters v. Peters*, 43 N. J. Eq. 140.

as to the last resting place, and after the father had thus performed his part of the agreement, repudiate it and contend for a removal. But in such a case, as against any but the next of kin, there could be but little doubt but that the widow would have the right to remove the body. Changes of location and the vicissitudes of life often make this necessary and proper.

Beyond any question there is a liability to the next of kin for the wrongful mutilation of a body. Thus, where a child was committed to a hospital for treatment and after death, without the knowledge or consent of the father, an autopsy was had, it was held that the father was entitled to damages against the hospital for the wrong.³² But this rule, like any other, has its exceptions. For instance, where one dies under such unusual circumstances that a coroner's inquest is required by law, and, in order to properly carry out the requirements of law in ascertaining the cause of death, an autopsy becomes necessary, neither the coroner nor the surgeon acting under his lawful orders are liable for any damages by reason of an autopsy made necessary by a mandate of the law.³³ This is necessarily true, because an officer cannot be held liable in damages for the discharge of a duty imposed upon him by law. This is upon the theory that the next of kin have a right to the possession of a corpse in the same condition it was in life.³⁴ But in a case where a switchman was fatally injured in a railroad accident and the foreman directed him to be taken to the nearest hospital in an ambulance, where he was attended by the surgeon of the railway company and his leg amputated and burned by the hospital authorities, accord-

ing to the custom in such cases, it was held that neither the railway company nor the surgeon were liable for injury to the feelings of the widow because of the mutilation and destruction of the amputated member by fire, the operation having been performed in good faith and having been apparently, if not really, necessary.³⁵ But no person or organization of persons would have the right to dissect a body without the consent of the person given before death or of those concerned after it. And this would necessarily be true, no matter how free from actual evil intent those guilty of the act might be. For instance, a plea that it was urgently necessary for the advancement of science could not avail to override the feelings and sensibilities of those near and dear to the dead. A person could probably consent in his lifetime to such a disposition of his body, and no one perhaps would be heard to complain unless of kin by marriage or blood. The courts seem to assume, by way of *dicta*, at least, that a person may, in life, authorize such disposition of his body by will.³⁶ Certainly this could be done as to all others except the surviving husband or wife or next of kin. But the body is not property and is not the subject of a commercial sale or gift. And it is at least doubtful if a person could give his body over to dissection against the wishes of those most concerned after death.

The disposition and right of custody of dead bodies under the ecclesiastical law of England is different from the law in this country in some particulars, but as church and state have never been blended in this country and we have never had such courts here, a discussion of that feature of the law is omitted.

W. C. RODGERS.

Nashville, Ark.

(32) *Burney v. Children's Hospital*, 169 Mass. 57.

(33) *Young v. College of Physicians and Surgeons*, 81 Md. 358.

(34) *Larson v. Chase*, 47 Minn. 307; *Doxtator v. Chicago & N. W. Ry. Co.*, 120 Mich. 596; *Burney v. Children's Hospital*, 169 Mass. 57.

(35) *Doxtator v. Chicago & W. M. Ry. Co.*, 120 Mich. 596.

(36) *Neighbors v. Neighbors*, (Ky.) 65 S. W. 607; *Larson v. Chase*, 47 Minn. 307; *O'Donnell v. Slack*, 123 Cal. 285; *Wynkoop v. Wynkoop*, 42 Pa. St. 293; *Pierce v. Swanpoint Cem.*, 10 R. I. 227, 239; *Hackett v. Hackett*, 18 R. I. 155.

PUBLIC SERVICE CORPORATIONS—EQUAL
RATES AND SERVICE.THE COLORADO TELEPHONE COMPANY v.
WILMORE.

Supreme Court of Colorado, July 23rd, 1911.

Where a telephone company has established a zone of service in a suburb adjoining a city, the residents of which suburb are served as residents of the city, the company has no right to place them on a different exchange and deprive them of facilities, except at increased cost, theretofore enjoyed, unless new conditions reasonably allow such change. (By C. L. J.)

BAILEY, J.: "Defendant below, plaintiff in error, the Colorado Telephone Company, is a corporation engaged in the business indicated by its name, with its principal office and chief business in the City and County of Denver. Plaintiffs, defendants in error, reside in Jefferson County, with places of business and residences just over the line dividing that county from the city and county of Denver proper, but immediately tributary to the latter territory. On August 29th, 1901, a contract was made between the defendant and Wilmore, one of the plaintiffs under the terms of which the defendant, has ever since been, and still is, furnishing him telephone service from its Denver system to his place of business. Similar contracts were also made between the other plaintiffs and the defendant at different times thereafter, prior to the institution of this suit, under which they have had like telephone service, both for business and social purposes. Each of the contracts contains an express provision making it subject to termination, at the option of either parties, upon 30 day's notice in writing. When these several contracts were entered into, there were only a few people located in the neighborhood of the plaintiffs. Since that time, however, the community in the vicinity of the residences and places of business of the plaintiffs has grown in population so that the number of residents therein, who demand, require and are entitled to telephone service, has increased correspondingly, and it became necessary for the company to establish an exchange at the Town of Arvada, situated some three or four miles north and west of the several respective locations of plaintiffs, from which to serve the people of that town and vicinity.

The main purpose of the exchange at Arvada was to give service to and between those living in and near to that village. The town, however, is connected by a trunk line with the Denver system, just as, for example, are the towns of Golden, Boulder and other state towns so connected. Subscribers to, and those receiving service from the Arvada exchange in order to communicate with the users of telephones connected with the Denver system, must do so over a single line and are subjected to a toll charge therefore, like subscribers in the Golden or Boulder exchange. The testimony established, and the court in substance found, that, geographically, the plaintiffs are in a territory immediately tributary to Denver, and are and can be more readily and naturally connected with the Denver telephone system than with the Arvada exchange.

After the new exchange has been established, notice was given to each of the plaintiffs, agreeable to the provision contained in the several contracts between them and the defendants that the particular contracts would be terminated at the expiration of 30 days, when, if the plaintiffs, or any of them, so desired, other contracts would be made by which telephone service would be furnished to them through the Arvada exchange, at the same rate, with like facilities, and of the same character and quality, as that furnished to other users in that neighborhood so connected.

Upon receipt of this notice plaintiffs brought a common suit to enjoin the defendant from exercising its option under these respective contracts to terminate them, or any of them, and to compel it to furnish each of the plaintiffs with telephone service at the same rate, in the same manner and through the same exchange, as had previously been done.

All purely technical objections urged will be disregarded, and matters affecting the merits of the controversy only will be considered and determined, that there may be an end to litigation.

The record shows that plaintiffs have for years been receiving telephone service from the defendant company, out of its main exchange in the City of Denver, under special contracts, which could by their terms be terminated by either parties on thirty days' notice. The plaintiffs were, for all these years, recognized as being in the Denver telephone zone, and according to the proofs are geographically well within the limits of the local business of defendant, as carried on in and about the City of Denver. They are, therefore, because of their established and settled status in that zone, entitled to continue to have, as in the past, tele-

phone service, upon the same terms and conditions, in all particulars under which others, like or similarly situated in that particular territory, have received it.

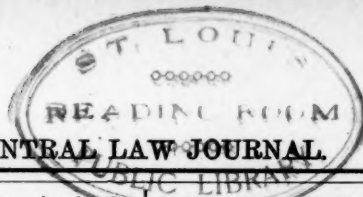
It may be admitted that the specific contracts, under which service has been furnished by the company, and received by the plaintiffs can be lawfully terminated, upon compliance with their conditions as to the notice; but the question there is not one of termination of the contract, but termination, or change of character and quality of service. The service to plaintiff may not be terminated at will by this public service corporation, or the character or quality of it changed, so as to make it essentially different from, or inferior to, and more expensive than, that which is now being furnished to other users, like or similarly situated in the Denver zone, so long as they are ready to receive and pay for it, after the same manner, and upon the same terms and conditions as others in that territory do. In other words, plaintiffs are entitled to have direct connection with the Denver system, through some exchange in that recognized telephone zone, so that they may reach all users of the service out of the main, and all other exchanges in the Denver system, just as other subscribers therein do.

It is clear that the claim of plaintiffs to the right of direct connection with the main or central switchboard is untenable, and can neither be upheld nor enforced. But the attempt in this case is to put plaintiff into the Arvada exchange where a toll charge is made, both to them, when they call a person in Denver, and also to any one in Denver calling them. This is clearly an inferior service to that which has been and yet is being furnished plaintiffs, and admittedly would be greatly more expensive; and it is inferior to, and more expensive than, that which is still furnished, and is to be furnished, to other users of like service in the Denver zone, to which latter territory plaintiffs belong, because of past recognition of an established service to them by defendant, from its main exchange of the Denver system, and also because of their geographical position. In other words, they have for years been recognized, accepted and given service by the defendant, as belonging to that territory, and a status for them has been created in that respect, so that the company will not now be heard to say otherwise, or to discontinue service to them from some exchange of the Denver system, unless replaced by some other service equally acceptable and advantageous. The defendant may put plaintiffs in

an exchange in Denver which gives them equal service, upon the same terms and conditions, with other patrons in the same telephone zone. It may also make the same charge therefor so long as that is a just and reasonable one, which it makes to its other Denver patrons, like circumstanced. It is within the discretion of the defendant to connect these plaintiffs with any Denver exchange, the Gallup, the Hickory, or any other exchange, which will give to them like service with that given to its other Denver patrons, from the York, the Champa, the South, or any other of the exchanges in the Denver system. That plaintiffs happen to be located just across the line which divides the territory of the City and County of Denver from Jefferson County is immaterial. Such lines are purely artificial and the duties and obligations which a public service corporation owes to its patrons remain precisely the same, whether such patrons live and have their places of business on the one side of such a line or the other.

The fundamental difficulty in the case arises from an attempt to erroneously classify plaintiffs as users of telephone service. The defendant seeks to treat them as being in the Arvada zone, or system, and entitled only to such service, on the same terms and conditions, that its patrons receive, who are properly located in the zone for that purpose; while in fact the pleadings and proofs show that plaintiffs are in and belong to the Denver zone or system, and entitled to all the rights and privileges in that behalf which other users of the service in that territory have and enjoy.

The defendant has no more right to put the plaintiffs out of the Denver zone, or disconnect them from that system and give them an inferior and more expensive service, than it has to do the like with a subscriber in the York, Champa, or any other Denver exchange. If what is here attempted may be done, then a subscriber in the York exchange, on the outskirts of that territory, might be disconnected from his old exchange and connected with an exchange in Aurora, with an inferior and more expensive service, with but a single line to the Denver system, necessitating a toll charge, when communicating with any one in that city. That clearly would be a discrimination between him and other Denver subscribers, and manifestly could not be lawfully done over his protest. This example serves to illustrate the discrimination which is sought to be made between plaintiffs and other subscribers in the Denver system, with whom in the past plaintiffs have been served on the same footing, enjoying with them precisely the same telephonic privileges and service under equal



conditions, just as a user of the service in the York exchange has a status, which entitles him to connection, through that exchange, with all other subscribers in the Denver system, and just as the company would be prohibited from discriminating against him, as between other subscribers in that zone, in a like status, either as to rates, kind and quality of service, or otherwise; so is the company prohibited from doing the like with plaintiffs, because their status with and in relation to the company are identical with that of other Denver subscribers. It is, of no concern to plaintiffs that they be connected with the Arvada exchange; that would be of no benefit or advantage to them. They have no business interest there; their business and their patrons are in Denver, where they have always had direct communication, which privileges they now seek to retain in order to preserve their business and protect themselves against financial loss. For practical purpose plaintiffs might just as well be connected with defendant's Golden or Boulder exchange, and the company has just as much legal right to make that connection and compel plaintiffs to communicate with Denver through one of these sources, as it has to put them through the Arvada exchange, in the manner, and upon the terms and conditions, which admittedly it is its purpose to do.

The decree rendered is too broad in practically every particular, and must be reversed. The court had no authority to fix rates: That is purely a legislative and not a judicial function: It had no authority to perpetuate the contract between the parties as it attempted to do; and it had no authority to compel the defendant to give service out of the central or main exchange to the exclusion of all exchanges in the Denver system.

However, plaintiffs have, on proper averment, a cause of action, which, if supported by proofs, will entitle them to an order restraining the company from removing its telephone instrument from their places of business and residences; also from connecting them with the Arvada exchange, unless it gives a service therefrom at the same rate, on the same terms, in all respects, and of the same quality that it does to Denver patrons, from the Denver exchanges, like for illustration, that out of the York or Champa exchanges; and also from disconnecting them from its main exchange, until it is prepared, ready and willing to connect them with some other exchange, which will furnish the same class and quality of service, for the same pay, and on the same general terms and conditions, under which other users of the service in the Denver system receive it.

In our view of the matter, the conclusions

here announced adjust this controversy along lines so evidently in harmony with common fairness, reason and justice, that we deem it unnecessary to cite authorities to support them. If there are no authorities which uphold these conclusions there should be; and if there are authorities, certainly none are to be found in this state, holding otherwise, and we all are unwilling to be guided by or follow them.

To hold that plaintiffs have now no action in equity, to prevent the consummation of a situation from which they clearly would be entitled to relief, when that situation is effected, would be to sacrifice substance to form, a thing which, in the present day of advanced thought and general progress along every line, should neither be encouraged nor tolerated.

The judgment and decree is reversed, and the cause remanded with directions to the trial court to permit plaintiffs to amend their complaint generally, as they may be advised, and for further proceedings in conformity with these views."

"Reversed and remanded. Decision en banc. Mr. Justice Gabbert concurs in part. Chief Justice Campbell not participating."

NOTE.—*Equal Service and Equal Rates Under Substantially Similar Conditions to be Allowed by Telephone Companies.*—An esteemed correspondent and long-time friend and subscriber of our journal sends us an advance copy of the opinion in the principal case, and for this we tender thanks.

The opinion gives a clear statement of the obligations of a telephone company, as a public service corporation, and the recital of facts is quite full in development of the situation, as or not furnishing reasonable ground for the company to claim the right to decline to furnish patrons as of the zone in which they formerly were.

It must be conceded that a public service corporation must furnish the same service, under similar conditions to patrons at similar rates, and what are similar conditions is always a question of fact, the conditions being similar, it may be, at one time, and becoming dissimilar at a subsequent period.

Further it might be thought that prior furnishing of like service at like rates as to others might not be conclusive of the fact, that the conditions were similar, for the granting of like service and like rates may have been voluntary rather than compulsory. For example, the company in the principal case, establishing itself in Denver may have considered it would supply service to district tributary to Denver even at a loss, so far as the revenue from the district was concerned, because some of the city residents would be thereby accommodated and even induced to become subscribers, and thus the loss from tributary country be in a measure offset but there is a strong presumption that the com-

pany ought to be bound by the situation it creates.

There is no sort of doubt but at bottom the court in the principal case reasons along proper lines, but the serious question is, whether or not the customers in the zone served directly by the Denver system acquired a status, as if it were a part of the city, or, if former service being extended for the benefit of those in Denver, might be withdrawn when it had ceased to be the policy of the company to give an incidental benefit to its Denver subscribers.

It would hardly seem that a Denver subscriber could compel the company to continue to supply to him this incidental benefit, and yet, if that were the primary reason of the service being given, he would seem to have a better *status* than the subscriber outside of the city.

The principal case proceeds on the assumption that the "territory" in question belongs to the "Denver zone," and this assumption is rested on the fact of "past recognition of an established service to them by defendant, from its main exchange of the Denver system, and also because of its geographical position." "In other words," says the court, "they (plaintiffs) have for years been recognized, accepted and given service by the defendant, as belonging to that territory, and a status for them has been created in that respect."

We do not think a principle of this kind is absolute. If conditions changed, the status might disappear, and besides, the only status between the parties was one in which it was expressly provided that it was terminable upon notice by the company. It, therefore, was always qualified, and when the company gives notice of intent to terminate, the court refuses to allow it to be terminated, because the court says: "The question here is not one of termination of the contract, but termination, or change of character and quality of service."

In other words, if the company were not proposing to place the telephone subscribers it would continue to have in a new exchange, there would be no ground whatever to say there was any question but one of "termination of the contract." But to have to go into a new exchange and this when there is no essential change in conditions, the company's mere desire to charge another rate is a weak reason for permitting this.

There can scarcely be any doubt but the contracts in this territory were special for the very reason that it might be desired to change the service afterwards, and because this territory was not in the Denver zone in the same way as if it were a part of the city of Denver.

We approve very heartily every principle laid down as to the enforceability of equal rights among patrons, and we go along with the court quite far on the established status theory, but we doubt very greatly whether there was built up under special contracts, which it seems it was the invariable custom to make as to this territory, the recognized status of which the court speaks, though it may be there was status enough to prevent arbitrary change. C.

CORRESPONDENCE.

DISTINCTION IN CRIMINAL AND CIVIL CONTEMPT.

Editor Central Law Journal:

As a subscriber and interested reader of the Journal, I like to see it always accurate. In the last number your criticism of the opinion of Mr. Justice Lamar in the contempt case of *Gompers, et al.* rests, it seems to me, on an erroneous impression of what the court actually decided in that case.

You say, "It was held that there was a proceeding in civil contempt to punish an act of which the court had not other jurisdiction than by a proceeding in criminal contempt." Is this quite accurate? The argument of the opinion seems to be that the court had jurisdiction of the civil contempt under the complaint of the Buck Stove & Range Company, and might have imposed a fine for the use of the complainant, measured in some degree by the pecuniary injury caused by the violation of the injunction. But this the lower court failed to do. Having taken jurisdiction at the instance of the complainant, and in a civil procedure in equity, it proceeded to inflict a personal penalty which could not benefit the complainant and which, as Justice Lamar says, "Could have been properly imposed only in a proceeding instituted and tried as for criminal contempt."

Again, you say, "The character of the act, as placing it in the category of criminal and not civil contempt, presents a narrow question." But as I read the opinion, the court makes no such question. It was not the character of the act that made the distinction. The court merely recognizes two methods of procedure as a remedy or punishment of the same act of disobedience. The trouble arose from the fact that the Supreme Court of the District of Columbia adopted the civil procedure and inflicted the criminal penalty. The illustration given by Justice Lamar is perfect. It is as if in an action of A against B for assault and battery, a judgment should be rendered sentencing B to prison. Such a sentence would have to be set aside— and so of Justice Wright's sentence of the civil defendants in the contempt proceedings of *Buck Stove & Range Company v. Gompers, et al.*

Without wishing to seem too contentious, I am compelled also to dissent from your last proposition, that the decision means application of the constitutional guaranties of criminal trials "because of the mere name given to the form of procedure." Is it not rather because of the penalty which may attach? In civil contempt proceedings the defendant may be imprisoned, it is true; but only for the purpose of compelling him to do the thing commanded; in the expressive language quoted in the opinion, "He carries the keys of his prison in his own pocket." In criminal contempt, on the other hand, the defendant may be, as *Gompers* was (and may be again) sentenced to prison for a definite term as for a criminal act. If then the court allows him all the privileges which the law extends to those accused of crime, is it not because of the penalty that

may be imposed rather than the form of procedure?

Very truly yours,

LINCOLN B. SMITH.

Chicago, July 8, 1911.

[Note.—Justice Lamar says that "proceedings for civil contempt are a part of the original cause," and "the weight of authority is to the effect that they should be entitled therein." He also indicates that such a proceeding is "instituted for private litigation," and that in criminal contempt it is "for public prosecution"; one is "between the original parties" in a cause, and the other "between the public and the defendant."

He also said, that in a case where "a sentence for criminal contempt was erroneously entered in a proceeding which was a part of the equity cause, it would be necessary to set aside the order of imprisonment, examine the testimony and thereupon make such decree as was proper." But that was not what was done in the Gompers case, but the contempt proceedings were ordered dismissed "without prejudice to the power and right . . . to punish by a proper proceeding." That proceeding in criminal contempt was in the view of the learned justice the only proper proceeding we think perfectly clear.

With all due respect to our correspondent, it seems to us that the justice thought the whole proceeding *coram non iudice*, because there was "a civil proceeding" for a criminal contempt, and as we gather him, there is criminal contempt whenever a judicial decree "operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience." Gompers' act, if committed, was a "completed act of disobedience," and, therefore, there was no way of punishing it except by proceedings in criminal contempt.

Therefore it seems to us, that it was not the inherent nature of the act, which threw it on the side of criminality, but the necessity of procedure, and for that reason alone there ought not to be a stigma on one disobeying the original remedial process. Doing what one is commanded to refrain from seems in no way more malevolent than refusing to do what one is commanded to do.

Reduced to its final analysis it may be thought that neither civil nor criminal contempt is to be taken as indicating the quality of a contempt, but the method necessary to be pursued in respect to the contempt. But this does not derogate from the necessity of proper procedure for a court's jurisdiction to attach. In the Gompers case it was held that it had not attached.

We thank our correspondent for giving us his view, as we think the case of interest—especially in its distinction as to what should be done where jurisdiction attaches by proper procedure, if "the sentence is erroneously entered," and what, where the proceeding, at least in civil contempt, does not apply at all to the act of contempt.—Editor].

BOOK REVIEWS.

DILLON ON MUNICIPAL CORPORATIONS—FIFTH EDITION.

The first edition of this great work appeared in 1872, two years prior to the establishment of this Journal, of which the author was its first editor.

The following year came the second edition. Eight years elapsed when the third came and nine more when the fourth appeared.

The twenty-one years, which followed, carried that work probably to more book cases than any other American law book.

In Judge Dillon's dedication of the fourth edition to the distinguished Justice Miller he said: "The evening shadows of our lives fall upon the page," and now we behold his fifth edition coming from the press.

The Dillon text in all its vigor, clearness and classic purity, comes now to treat of "the American law of municipalities as it exists in the year 1911."

Happy the country that possesses a writer who is able to hold up a bright beacon in the wilderness of decision created during the years elapsing since Judge Dillon wrote his fourth edition.

There are books, the furthest hope of which is to set things in order, more or less aiding the searcher for cases, and there are books, wherein an author moves with a personality that illuminates the reason of the law. John F. Dillon is such an author and when he says he comes "to exhibit comprehensively and fully the American law of municipalities as it exists in the year 1911," lawyers believe that he will quite nearly advise them what that law is, and courts will take the endeavor as excellent authority.

It would seem superfluous to say more. Dillon's fifth edition has arrived. The profession feels it needs it more than ever before.

The present work is in five volumes, the final volume being the table of cases and index of first four. The work is therefore much recast and enlarged and the scope extended. The five volumes take the place of two and many new subjects and chapters are added.

The binding of the volumes is in law buckram and upon them is the hallmark of the publishing house of Little, Brown and Company, Boston, 1911.

HUMOR OF THE LAW.

Years ago, Atchison people put all their stories "on" Colonel E., a well-known lawyer. This is one told on him: He had a client who was guilty of murder, and E. had no hope of acquitting him. Managing to get a friend on the jury, he said to him: "Bill, hold out for manslaughter; never give in." The jury was out two days, and finally brought in a verdict for manslaughter, and Colonel E. was much pleased. His friend on the jury, meeting him later, said: "I had a terrible time bringing the others around to my way of thinking; the other eleven insisted on acquittal; but I held out, as you told me, and we finally won."—Atchison Globe.

WEEKLY DIGEST.

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1. **Action—Justiciable Right.**—In administering the law, courts have nothing to do with the moral quality of an act where no legal right is invaded.—*Hardison v. Reel*, N. C., 70 S. E. 463.

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3. **Adverse Possession—Interruption.**—Pendency of a lawsuit or the coming in of another person and claiming against one in adverse possession would not necessarily cause a breach in the continuity of the adverse possession.—*Shingley v. Bailey*, Ga., 70 S. E. 563.

4. **Overlapping Patents.**—A person living and holding outside the lap of two patents acquires no right to land within the lap as against the senior patentee by adverse possession.—*Tennis Coal Co. v. Napier*, Ky., 135 S. W. 295.

5. **Prescription.**—Where in a boundary line dispute no prescriptive title was claimed, no right of either party was surrendered by occupancy.—*Myers v. Reynolds*, Ind., 94 N. E. 345.

6. **Tacking Possessions.**—The adverse possession of a wife and that of her husband as tenant by curtesy may be tacked.—*Stricklin v. Moore*, Ark., 135 S. W. 360.

7. **Appeal and Error—Continuing Temporary Injunction.**—The continuance of a temporary injunction pending an appeal to the Supreme Court from a decree of the circuit court is within the powers of the latter court.—*Merrimack River Savings Bank v. City of Clay Center*, 31 S. C. 295.

8. **Arbitration and Award—Common Law.**—At common law a submission to arbitration was revocable at any time before the award was actually made.—*Pizzini v. Hutchins*, 127 N. Y. Sup. 1043.

9. **Attachment—Purchasers Under Levy.**—On levy of several attachments by different persons on different articles of personalty, pur-

chasers of such articles cannot require attaching creditors to sue to determine whether the property is subject to attachment.—*Southern School Book Depository v. Ginn & Co.*, Ga., 70 S. E. 569.

10. **Surety Bond.**—A surety in an attachment bond held not released from liability by a subsequent increase of the ad damnum, under Rev. Laws, c. 173, sec. 48.—*McNeilly v. Driscoll*, Mass., 94 N. E. 273.

11. **Attorney and Client—Authority.**—Counsel have, by statute, authority to bind parties by agreements in relation to a cause which can only be set aside for fraud, accident, mistake, etc.—*Palliser v. Home Telephone Co.*, Ala., 54 So. 499.

12. **Lien for Services.**—An attorney who brings an action against the direction of his client has no lien upon the action for his services.—*Mitchell v. Mitchell*, 127 N. Y. Sup. 1065.

13. **Money Collected.**—An action against an attorney for full amount collected by him, after he had sent his check for such amount, less charges for services, held not an undertaking to rescind a contract, within the rule requiring the rescinding party to put the other in statu quo.—*Illustrated Card & Novelty Co. v. Dolan*, Mass., 94 N. E. 299.

14. **Wrongful Discharge.**—Where an attorney is wrongfully discharged by his client, he may recover the sum agreed upon to be paid for the entire services.—*Crye v. O'Neal & Allday*, Tex., 135 S. W. 253.

15. **Bankruptcy—Exemption.**—Where lands were set apart to a bankrupt under the bankruptcy act of 1867, the bankruptcy court was without jurisdiction to order the sale of the reversionary right of the bankrupt.—*Lathrop v. Pate*, Ga., 70 S. E. 569.

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